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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARLIN THOMPSON, Defendant and Appellant.	G053939 (Super. Ct. No. 15NF1338) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter L. Spinetta, Judge. (Retired judge of the Contra Costa Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Bruce L. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and James M. Toohey, Deputy Attorneys General, for Plaintiff and Respondent.

As defendant Marlin Thompson was walking out of a store with a pack of beer, a store employee asked to see the receipt for the beer. Defendant threatened the employee and exited the store without paying for the beer. A jury found defendant guilty of second degree robbery (Pen. Code, § 211; all statutory references are to the Penal Code). In a bifurcated proceeding, the trial court found true the allegation that defendant had served a prior prison term. The court sentenced defendant to three years in state prison.

Defendant contends his robbery conviction must be reversed because there was insufficient evidence to prove the store employee had constructive possession of the beer, as the store had a policy to not confront or pursue a shoplifter. We disagree. The evidence did not show the employee's conduct violated the store's policy. Moreover, even had the employee violated the policy, she remained in constructive possession of the property during the robbery.

Defendant also contends the trial court erred in instructing the jury with a modified version of CALCRIM No. 1600, the standard instruction on robbery. He argues the court directed a verdict when it instructed the jury a store employee who is on duty has possession of the store owner's property. We disagree. The trial court's instruction was correct because the employee was in constructive possession of the property.

Finally, defendant argues CALCRIM No. 1600 is erroneous because it states a robbery occurs if the defendant "uses" force or fear to take property, whereas section 211 defines robbery as a taking "accomplished by means of force or fear." We disagree, as there is no meaningful difference between the two phrasings. CALCRIM No. 1600 adequately restates the elements of robbery set forth in section 211, and the trial court did not commit instructional error. Accordingly, we affirm the robbery conviction.

FACTS

In April 2015, Melinda Burns (Melinda) and another employee were working the registers at a Walgreens store in Orange County. Because the store has a

policy that cashiers cannot ring up alcoholic beverages if they are under 21 and the other cashier was under 21, Melinda was the only working cashier who could ring up a purchase of alcoholic beverages. At approximately 5:30 p.m., Melinda observed defendant walking behind her toward the store's exit with a case of beer. Because Melinda had not rung up defendant's purchase of beer, she turned around and asked to see defendant's receipt for the beer. Defendant responded that he had purchased the beer. After Melinda again asked to see a receipt, defendant stated, "You don't know what I have on me or what I can do to you. Just go back and do your job." Melinda believed defendant's statement to be a threat of violence, and she was scared defendant would hurt her if she tried to stop him. After defendant exited the store, Melinda followed him into the parking lot to obtain the license plate number of his vehicle. Defendant turned around and told Melinda to go back inside the store. Melinda returned to the store and called 911.

Asked about Walgreens's policy in the event of theft (hereinafter shoplifting policy), Melinda testified she was not given specific training about the shoplifting policy. "The only thing that we were told is that we cannot stop [shoplifters], we can't get in front of them, we can't touch them . . . ."

Walgreens employee Chantal Childress (Chantal) testified the shoplifting policy is: "We don't chase them, we don't come up to them, or anything. We're told we can observe; that's it." Chantal explained employees are not permitted to stand in front of a shoplifter, and they cannot "chase anybody who has stolen anything from the store." Although accusing someone of shoplifting was against store policy, she did not know if asking a customer for a receipt was a violation of the policy.

DISCUSSION

1. *The evidence was sufficient to support the robbery conviction.*

Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will,

accomplished by means of force or fear." "'A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim's presence.'" (*People v. McKinnon* (2011) 52 Cal.4th 610, 686 (*McKinnon*).) A robbery can only be committed against a person who is either in actual or constructive possession of the property. (*Id.* at p. 687.) "[R]egardless of their specific responsibilities, on-duty employees have constructive possession of their employer's property for purposes of a robbery." (*Ibid.*, citing *People v. Scott* (2009) 45 Cal.4th 743, 752, 754 (*Scott*).) The reason is "the employee's relationship with his or her employer constitutes a 'special relationship' sufficient to establish the employee's constructive possession of the employer's property during a robbery." (*Scott*, at p. 754.)

Defendant contends that because Walgreens policy prohibits its employees from confronting or obstructing shoplifters, Melinda no longer was in a "special relationship" with Walgreens at the time defendant used fear to retain the stolen property. We reject this contention for two reasons.

First, the evidence did not show Melinda's actions (asking for a receipt & following defendant outside) violated Walgreens's shoplifting policy. Melinda testified that under the policy, an employee cannot stop, touch or physically block a potential shoplifter from exiting. Chantal testified employees cannot accuse a customer of shoplifting, stand in front of a shoplifter or chase after a shoplifter. However, Melinda's actions did not fall within any of those prohibitions. She merely asked defendant for a receipt and followed him outside to obtain a license plate number. Thus, her conduct did not violate the store's shoplifting policy.

Second, even if Melinda's conduct violated Walgreens's shoplifting policy, it did not take her outside the scope of the rule that "all on-duty employees have constructive possession of the employer's property during a robbery." (*Scott*, *supra*, 45 Cal.4th at p. 755.) That rule "is consistent with the culpability level of the offender and

the harm done by his or her criminal conduct. As a matter of common knowledge and experience, those who commit robberies are likely to regard all employees as potential sources of resistance, and their use of threats and force against those employees is not likely to turn on fine distinctions regarding a particular employee's actual or implied authority." (*Ibid*.) As the high court has stated: "It is the conduct of the perpetrator who resorts to violence to further his theft, and not the decision of the victim to confront the perpetrator that should be analyzed in considering whether a robbery has occurred." (*People v. Gomez* (2008) 43 Cal.4th 249, 264.) Here, defendant used fear against Melinda to retain possession of the stolen beer. (*McKinnon*, *supra*, 52 Cal.4th at p. 686 [the defendant is guilty of robbery where "he uses force or fear to retain [stolen property] or carry it away in the victim's presence"].) As an on-duty employee of Walgreens at the time, Melinda was in constructive possession of the stolen property. (*Scott*, at p. 755.) Thus, substantial evidence supported the robbery conviction.

2. *There was no instructional error.*

The trial court instructed the jury with a modified version of CALCRIM No. 1600. It stated: "To prove that the defendant is guilty of . . . the crime of robbery, . . . the People must prove[,] one, the defendant took property that was not his own, two, the property was in the possession of another person, three, the property was taken from the other person or from his or her immediate presence, four, the property was taken against the person's will, five, the defendant used force or fear to take the property or to prevent the person from resisting, and, six, when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently." The court further instructed: "A store employee who is on duty has possession of the store owner's property." Defense counsel neither objected to the instruction nor requested clarifying instructions.

Defendant argues the trial court prejudicially erred in giving modified CALCRIM No. 1600 because it is not correct as a matter of law. We disagree.

"'An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law.' [Citation] '"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'"' [Citation.] Taking into account the instructions as a whole and the trial record, we 'determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner.' [Citation.] We presume that jurors are intelligent and capable of correctly understanding, correlating, applying, and following the court's instructions." (*People v. Acosta* (2014) 226 Cal.App.4th 108, 119.) "'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.'" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1112.)

Defendant first contends the trial court prejudicially erred when it instructed the jury an on-duty store employee has possession of the store's property, as the facts of the case showed the store's shoplifting policy "took away any implied authority or special relationship to protect store property, and with it any presumed constructive possession." We disagree for the same reasons stated earlier. The evidence did not show Melinda violated Walgreens's shoplifting policy.

Moreover, even if she had violated the shoplifting policy, Walgreens's property was in Melinda's constructive possession under *Scott*. Thus, the trial court did not err in instructing the jury an on-duty employee had possession of the store's property.

Defendant also contends CALCRIM No. 1600 misstates the crime of robbery. He notes although section 211 defines robbery as a taking "accomplished by means of force or fear," CALCRIM No. 1600 does not use the term "accomplished." Rather, it substitutes the word "used" for "accomplished." For example, CALCRIM No. 1600 provides the fifth element the People must prove is "the defendant used force or

fear to take the property or to prevent the person from resisting." We disagree that CALCRIM No. 1600 misstates the law of robbery.

There is no meaningful distinction between stating "the defendant accomplished the taking of the property by means of force or fear," and stating "the defendant used force or fear to take the property." Both phrasings convey the meaning that a defendant employed fear or force to achieve the taking of property. Both convey the causal relationship between the force or fear used and the taking. The latter phrasing, found in CALCRIM No. 1600, has been utilized by our Supreme Court when discussing the crime of robbery. (See, e.g., *McKinnon*, *supra*, 52 Cal.4th at p. 686 ["'A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim's presence'"]; *People v. Gomez, supra*, 43 Cal.4th at p. 265 ["evidence supports the jury's determination that defendant used force to retain the property"].) Thus, CALCRIM No. 1600 correctly states the law of robbery.

Defendant contends the jury could not find his threat resulted in the successful taking of the beer. He argues the evidence showed he was able to retain possession of the stolen beer not by his threat against Melinda, but rather by the store's shoplifting policy. However, as discussed above, the evidence showed defendant used fear to overcome Melinda's resistance. Her resistance neither violated the shoplifting policy nor placed her outside the scope of the "special relationship" between on-duty employees and their employers. The jury's finding defendant was guilty of robbery established the necessary causal relationship between defendant's threat against Melinda and the successful taking. Accordingly, the trial court did not err in giving modified CALCRIM No. 1600.

Our jury instruction conclusion also disposes of defendant's ineffectiveness claim. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1018 [rejecting ineffectiveness claim because "competent counsel could reasonably conclude that the instructions

adequately advised the jury . . . , and that an additional instruction . . . was unnecessary"]; see also *People v. Anderson* (2001) 25 Cal.4th 543, 587 [counsel is not ineffective for failing to proffer futile objections].)

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.